

**STATE OF MICHIGAN
IN THE SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant,

Supreme Court No. 154764

Court of Appeals No. 325407

-vs-

Circuit Court No. 13-40406-FH

LONNIE JAMES ARNOLD

Defendant-Appellee.

**MONROE COUNTY PROSECUTOR
MICHIGAN ATTORNEY GENERAL**
Attorneys for Plaintiff-Appellant

STATE APPELLATE DEFENDER OFFICE
Attorney for Defendant-Appellee

**APPELLEE'S BRIEF
ORAL ARGUMENT REQUESTED**

Submitted by:

Marilena David-Martin (P73175)
Attorney for Defendant-Appellee
State Appellate Defender Office
645 Griswold, Suite 330
Detroit, MI 48226
313-256-9833
mdavid@sado.org

Table of Contents

Index of Authorities	i
Statement of Questions Presented.....	iv
Statement of Facts.....	1
Summary of Argument	6
I. An individual sentenced to incarceration following a conviction for indecent exposure by a sexually delinquent person must be sentenced to an indeterminate prison term of one day to life. The trial court may not impose a minimum sentence within the sentencing guideline range.	7
A. This Court’s analysis of this issue is de novo and guided by well-established principles of statutory construction.	8
B. The Legislature enacted a specific sentencing provision that applies only to convictions for indecent exposure by a sexually delinquent person, but also enumerated that offense as subject to the Michigan Sentencing Guidelines.	9
C. The 2005 amendment of MCL 750.335a(2)(c) from “may be punishable” to “is punishable” shows the Legislature’s intent to require a sentence of one day to life following a sentence of incarceration for indecent exposure by a sexually delinquent person.	11
D. The specific and most recently amended penalty provision of MCL 750.335a(2)(c) controls over the more general Michigan Sentencing Guidelines.	16
II. This court’s decision in <i>People v Lockridge</i> clarified that the sentencing guidelines are advisory, leaving only one mandatory sentencing provision of incarceration for violations of MCL 750.335a(2)(c): one day to life.....	22
III. <i>People v Campbell</i> was correctly decided. A person convicted of indecent exposure by a sexually delinquent person and sentenced to incarceration must be sentenced to one day to life under MCL 750.335a(2)(c).....	25
Summary and Request for Relief	28

Index of Authorities

Cases

<i>Ford Motor Co. v City of Woodhaven</i> , 475 Mich 425; 716 NW2d 247 (2006).....	16, 20
<i>Frank v Linkner</i> , __ Mich __; 894 NW2d 574 (2017)	9
<i>In re Kostin</i> , 278 Mich App 47 (2008)	24
<i>Manuel v Gill</i> , 481 Mich 637 (2008).....	16
<i>People v Babcock</i> , 469 Mich 247, 666 NW 2d 231 (2003)	8
<i>People v Barbee</i> , 470 Mich 283; 681 NW2d 348 (2004)	9
<i>People v Buehler</i> , (On Remand), 271 Mich App 653 (<i>Buehler II</i>).....	4, 15, 23
<i>People v Buehler</i> , 477 Mich 18; 727 NW2d 127 (2007)	<i>passim</i>
<i>People v Butler</i> , 465 Mich 940; 639 NW2d 256 (2001)	16, 17
<i>People v Campbell</i> , 316 Mich App 279; 894 NW2d 72 (2016)	<i>passim</i>
<i>People v Campbell</i> , __ Mich App __ (2016).....	5
<i>People v Craig</i> , 488 Mich 861; 788 NW2d 13 (2010).....	10
<i>People v Hall</i> , 499 Mich 446; 884 NW2d 561 (2016)	9
<i>People v Kelly</i> , 186 Mich App 524, 465 NW2d 569 (1990).....	18, 19
<i>People v Lockridge</i> , 498 Mich 358, 870 NW2d 502 (2015).....	<i>passim</i>
<i>People v Ramsdell</i> , 230 Mich App 386; 585 NW2d 1 (1998).....	16, 20
<i>People v Webb</i> , 458 Mich 265, 580 NW2d 884 (1998)	27
<i>People v Williams</i> , 268 Mich App 416; 707 NW2d 624 (2005)	27
<i>People v Williams</i> , 475 Mich 245; 716 NW2d 208 (2006)	8
<i>People v Winford</i> , 404 Mich 400; 273 NW2d 54 (1978)	18

<i>Robinson v City of Lansing</i> , 486 Mich 1; 782 NW2d 171 (2010).....	9
<i>United States v Crosby</i> , 397 F 3d 103 (CA 2, 2005).....	4

Constitutions, Statutes, and Rules

MCL 750.10a.....	1, 17, 18
MCL 750.158.....	10, 18
MCL 750.335a.....	<i>passim</i>
MCL 750.335a(2)(c).....	<i>passim</i>
MCL 750.338 et seq	10, 18, 21
MCL 767.61a.....	18
MCL 769.34 et seq	<i>passim</i>
MCL 769.9(2)	18, 19
MCL 771.1(1)	17
MCL 771.16q.....	21
MCL 777.11.....	19
MCL 777.16i.....	11
MCL 777.16q.....	<i>passim</i>
MCL 777.19.....	19
MCL 777.51(2)	10
MCL 777.54(2)	10
MCL 777.6.....	8, 19
MRE 404(b)	2

Other Authorities

1927 PA 175	18
1952 PA 234	18
1998 PA 317	10
2005 PA 300	11, 12, 13, 15
2006 PA 164	27
HB 4597.....	20
HB 4599.....	20

Statement of Questions Presented

- I. **Must an individual sentenced to incarceration following a conviction for indecent exposure by a sexually delinquent person be sentenced to an indeterminate prison term of one day to life? The trial court may not impose a minimum sentence within the sentencing guideline range.**

Court of Appeals answers, "Yes".

Plaintiff-Appellant answers, "No".

Defendant-Appellee answers, "Yes".

- II. **Did this Court's decision in *People v Lockridge* clarify that the sentencing guidelines are advisory, leaving only one mandatory sentencing provision of incarceration for violations of MCL 750.335a(2)(c): one day to life?**

Court of Appeals answers, "Yes".

Plaintiff-Appellant answers, "No".

Defendant-Appellee answers, "Yes".

- III. **Was *People v Campbell* correctly decided that a person convicted of indecent exposure by a sexually delinquent person and sentenced to incarceration must be sentenced to one day to life under MCL 750.335a(2)(c)?**

Court of Appeals answers, "Yes".

Plaintiff-Appellant answers, "No".

Defendant-Appellee answers, "Yes".

Statement of Facts

Fifty-year-old Lonnie James Arnold is serving a 25 to 70 year prison sentence for masturbating in an elevator with a 34-year-old woman present. To date, he has served approximately four and a half years for this offense. Mr. Arnold will not become eligible for parole until 2038, when he is 70 years old.

1. Trial Court Proceedings

In 2013, Mr. Arnold was convicted of aggravated indecent exposure and indecent exposure by a sexually delinquent person, MCL 750.335a(2)(b) and (c). A “sexually delinquent person” is defined as “any person whose sexual behavior is characterized by repetitive or compulsive acts which indicate a disregard of consequences or the recognized rights of others.” MCL 750.10a. Mr. Arnold was charged as a sexually delinquent person because of convictions 11 and 10 years prior to the instant offense—a 2002 misdemeanor guilty plea to indecent exposure and a 2003 guilty plea to gross indecency between a male and female. (Confidential Presentence Investigation Report (PSIR) provided under separate cover, p. 9).

Indecent exposure by a sexually delinquent person “is punishable by imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life.” MCL 750.335a(2)(c). The same crime is also listed as a Class A offense under the purview of the Michigan Sentencing Guidelines. MCL 769.34(2); MCL 777.16q.

At sentencing, Mr. Arnold objected to the use of the guidelines in determining his sentence and argued that the appropriate prison sentence for his conviction was

one day to life under the express provision of MCL 750.335a(2)(c). Appendix 12a-14a. The trial court rejected that argument and ruled it had no authority to impose such a sentence, stating “if I did that one day to life, DOC would write to me and say I cannot sentence him to life. They would say you have to set a maximum because I’ve had that happen on other cases already.” Appendix, 14a. The trial court added that, “I have to give him a tail. I can’t just say life because DOC will write to me and say you can’t do that. There’s a statute on it that says that. Okay.” Appendix, 14a.

Under the sentencing guidelines for the offense of indecent exposure by a sexually delinquent person, a Class A offense, Mr. Arnold’s guideline range was 135 to 550 months as a habitual fourth offender. Sentencing Information Report, Appendix 1b. He was sentenced to 25 to 70 years imprisonment.

2. Appellate Proceedings

Mr. Arnold appealed to the Court of Appeals challenging his convictions and sentences.¹ Mr. Arnold argued that he was entitled to resentencing because the trial court sentenced him under the sentencing guidelines based on a misconception of law and a misunderstanding that it did not have authority to sentence him to one day to life under MCL 750.335a(2)(c).

¹ In addition to the sentencing issue before this Court, Mr. Arnold argued that his conviction for aggravated indecent exposure should be vacated on double jeopardy grounds. The prosecutor agreed and the court vacated that conviction. The court denied relief on Mr. Arnold’s challenge to the admission of other acts evidence under MRE 404(b). *People v Lonnie James Arnold*, unpublished per curiam opinion of the Court of Appeals, issued April 12, 2016 (Docket No. 325407) (*Arnold I*), Appendix 26a.

On appeal, Mr. Arnold obtained confirmation from the Michigan Department of Corrections (MDOC) that a sentence of one day to life for a conviction of indecent exposure by a sexually delinquent person is a valid and recognizable sentence. Letter from MDOC, Appendix 2b. As explained by the MDOC, that is the *only* conviction for which it will automatically accept such a sentence due to the express penalty provision of MCL 750.335a(2)(c):

[T]he offense of Indecent Exposure by a Sexually Delinquent Person; 750.335A2C, is the **only** offense for which a 1 day to LIFE sentence is accepted by the MDOC and for which a letter will not be sent to the court.

Furthermore, if a sentence is imposed by the court that is a term of years for this offense a letter will not be sent to the court due to the MI Supreme Court opinion in *People v Buehler* case which indicates that sentencing guidelines may be applied to determine a sentence for this offense. Once the MI Supreme Court published the *Buehler II* opinion in 2007 the MDOC ceased writing letters to the courts on this specific offense due to the ambiguity of the statute and the opinions and the fact that the MDOC has no stand in these matters. [Emphasis in original; Appendix 2b].

Based on this information, Mr. Arnold argued to the Court of Appeals that he was entitled to resentencing so that he could be sentenced on the basis of accurate information and an accurate understanding of the law.

While Mr. Arnold's appeal was pending in the Court of Appeals, this Court issued *People v Lockridge*, 498 Mich 358, 870 NW2d 502 (2015), holding that the Michigan Sentencing Guidelines are advisory. Following *Lockridge*, Mr. Arnold supplemented his sentencing challenge and argued that the now-advisory nature of

the guidelines eliminated any conflict with the mandatory nature of the one day to life sentencing provision of MCL 750.335a(2)(c).

In its first opinion dated April 12, 2016, the Court of Appeals held that the sentencing guidelines controlled over the one day to life sentencing provision, relying on the holding in *People v Buehler (On Remand)*, 271 Mich App 653; 723 NW2d 653 (2006) (*Buehler II*).² *Arnold I*, Appendix 30a. As to the *Lockridge* argument, the court held that Mr. Arnold was entitled to a *Crosby*³ remand so the trial court could articulate whether it would have sentenced him under the guidelines or under the one day to life penalty provision had it known the guidelines were merely advisory. *Arnold I*, Appendix 30a-31a.

Mr. Arnold filed a Motion for Reconsideration arguing that the court's reliance on *Buehler II* was misplaced because *Buehler II* analyzed a previous version of MCL 750.335a(2)(c) than the version in effect at the time of Mr. Arnold's sentencing.

While the motion was pending, a different panel of the Court of Appeals decided *People v Campbell*, 316 Mich App 279; 894 NW2d 72 (2016). *Campbell* addressed precisely the same issue here—the statutory conflict between MCL 750.335a(2)(c) and the sentencing guidelines. The court held that because *Lockridge*

² The parenthetical short name references to “*Buehler I*” and “*Buehler II*” are used inconsistently in the appellate documents and opinions at issue here. The *Buehler* citations and short name references used by Mr. Arnold in this pleading are as follows (see also Table I, Appendix 3b):

- *People v Buehler (On Remand)*, 271 Mich App 653; 723 NW2d 578 (2006) (*Buehler II*)
- *People v Buehler*, 477 Mich 18; 727 NW2d 127 (2007)

³ *United States v Crosby*, 397 F 3d 103 (CA 2, 2005)

made the guidelines advisory, trial courts were required to sentence individuals convicted of indecent exposure by a sexually delinquent person consistent with MCL 750.335a(2)(c). *Id.* at 299-300.

Mr. Arnold filed a letter of supplemental authority with the Court of Appeals citing *Campbell's* holding. The Court of Appeals then granted Mr. Arnold's Motion for Reconsideration, issued a new opinion, found that *Campbell* was correctly decided, and ordered that Mr. Arnold be resentenced to one day to life under the mandatory penalty provision of MCL 750.335a(2)(c). *People v Lonnie James Arnold*, unpublished per curiam opinion of the Court of Appeals, issued September 22, 2016 (Docket No. 325407) (*Arnold II*), Appendix 32a-33a.

The prosecutor filed an application for leave to appeal, arguing that *Campbell* was wrongly decided. This Court granted the application and ordered briefing on the following issues:

The parties shall address: (1) whether MCL 750.335a(2)(c) requires the mandatory imposition of "imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life" for a person who commits the offense of indecent exposure by a sexually delinquent person, or whether the sentencing court may impose a sentence within the applicable guidelines range, see MCL 777.16q; (2) whether the answer to this question is affected by this Court's decision in *People v Lockridge*, 498 Mich 358 (2015), which rendered the sentencing guidelines advisory; and (3) whether *People v Campbell*, ___ Mich App ___ (2016) (Docket No. 324708), was correctly decided. [Order, Appendix 4b].

Summary of Argument

If an individual is sentenced to incarceration following a conviction for indecent exposure by a sexually delinquent person, MCL 750.335a(2)(c) requires the mandatory imposition of “imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life.” The sentencing court may not impose a minimum sentence within the applicable guidelines range, see MCL 777.16q.

The answer to this question was the same prior to *Lockridge*. MCL 750.335a(2)(c) is the more specific and most recently amended statute. Also, the plain language of the statute evidences the Legislature’s intent that individuals convicted of indecent exposure as a sexually delinquent person must be sentenced to one day to life if sentenced to incarceration.

Post-*Lockridge*, the answer to this question is even more emphatic as *Lockridge* rendered the sentencing guidelines advisory and obviated any conflict between MCL 750.335a(2)(c) and the guidelines.

The court correctly held in *People v Campbell*, 316 Mich App 279; 894 NW 2d 72 (2016), that the mandatory nature of MCL 750.335a(2)(c) controlled over the advisory sentencing guidelines.

Mr. Arnold must be resentenced to a prison term of one day to life.

Argument

- I. An individual sentenced to incarceration following a conviction for indecent exposure by a sexually delinquent person must be sentenced to an indeterminate prison term of one day to life. The trial court may not impose a minimum sentence within the sentencing guideline range.**

Mr. Arnold was convicted of indecent exposure by a sexually delinquent person for masturbating in an elevator with a woman present. His current sentence of 25 to 70 years, imposed pursuant to the Michigan Sentencing Guidelines, is invalid and must be vacated. This Court should hold that MCL 750.335a(2)(c) is controlling and that Mr. Arnold must be resentenced to a prison term of one day to life under the express penalty provision of MCL 750.335a(2)(c).

The plain language of the statutes involved reflects the Legislature's intent to impose a mandatory sentence of one day to life for individuals convicted under MCL 750.335a(2)(c) and sentenced to incarceration. To the extent there is any conflict between MCL 750.335a(2)(c) and the Michigan Sentencing Guidelines, the penalty provision of MCL 750.335a(2)(c) controls for the following reasons, which will be discussed in full below:

- MCL 750.335a(2)(c) was amended in 2005 from "may be punishable" to "is punishable," which created a mandatory penalty following a sentence of incarceration;
- MCL 750.335a(2)(c) is more specific while the sentencing guidelines are general;
- MCL 750.335a(2)(c) was amended more recently (in 2014) than the amendment to the relevant sentencing guideline provision (2006), and

the amendment retained the controlling nature of the one day to life penalty provision;

- The Legislature has indicated that under similar conflicts, a more specific statutory penalty provision controls over the guidelines, see MCL 769.34(2)(a) and MCL 777.6; and
- Mr. Arnold's 25 to 70 year prison sentence is contrary to the purpose and intent of the Legislature in enacting MCL 750.335a(2)(c).

Also, this Court's holding in *People v Lockridge*, 498 Mich 358, 870 NW2d 502 (2015), obviates any need to engage in a statutory construction analysis to resolve this issue. See Issue II. The sentencing guidelines were rendered advisory in 2015, which eliminated any perceived conflict between MCL 750.335a(2)(c) and the guidelines and clarified the controlling nature of MCL 750.335a(2)(c).

The sentence for a person convicted of indecent exposure by a sexually delinquent person and sentenced to incarceration is mandated by MCL 750.335a(2)(c). The Michigan Sentencing Guidelines do not control, and Mr. Arnold should be resentenced to a prison term of one day to life.

A. This Court's analysis of this issue is de novo and guided by well-established principles of statutory construction.

Questions of law, including the correct interpretation and application of statutes and constitutions, are reviewed de novo. *People v Babcock*, 469 Mich 247, 666 NW 2d 231 (2003).

A court's primary purpose in construing a statute is to ascertain and give effect to the Legislature's intent. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). The most relevant starting point for discerning legislative intent lies in the plain language of the statute. *Id.* "When the language of a statute is clear, it is

presumed that the Legislature intended the meaning expressed therein.” *Frank v Linkner*, __ Mich __; 894 NW2d 574, 580 (2017) (citations and quotation marks omitted). If the Legislature uses clear and unambiguous language, courts must enforce the statute as written. *People v Barbee*, 470 Mich 283; 681 NW2d 348 (2004).

In general, statutes that relate to the same subject must, if possible, be read together as one. *Robinson v City of Lansing*, 486 Mich 1, 15-16; 782 NW2d 171 (2010). “The Legislature is presumed to understand the meaning of the language it enacts into law....Each word of a statute is presumed to be used for a purpose....The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another.” *Linkner*, __ Mich at __; 894 NW2d at 581-582 (citations and quotation marks omitted).

It is a well-settled matter of statutory construction that when a conflict exists between two statutes, the one that is more specific to the subject matter generally controls. *People v Hall*, 499 Mich 446, 458; 884 NW2d 561, 567 (2016) citing *People v Buehler*, 477 Mich 18, 26; 727 NW2d 127 (2007).

B. The Legislature enacted a specific sentencing provision that applies only to convictions for indecent exposure by a sexually delinquent person, but also enumerated that offense as subject to the Michigan Sentencing Guidelines.

This Court must determine which sentencing provision controls for a sentence of incarceration following a conviction for indecent exposure by a sexually delinquent person—one day to life under MCL 750.335a(2)(c) or a minimum term calculated by the sentencing guidelines, MCL 769.34(2) and MCL 777.16q.

Under the sentencing guidelines, offenses are divided into certain crime classes that are generally determined based on the maximum sentence authorized by statute.⁴ Indecent exposure by a sexually delinquent person is listed as a Class A felony subject to the Michigan Sentencing Guidelines. MCL 750.335a(2)(c); MCL 769.34(2) and MCL 777.16q. At the time of Mr. Arnold’s sentencing, the guidelines directed that the minimum sentence “for a felony enumerated in part 2 of chapter XVII committed on or after January 1, 1999 *shall be* within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed.” MCL 769.34(2) (emphasis added).⁵ Indecent exposure by a sexually delinquent person is an enumerated felony under MCL 777.16q (part 2 of chapter XVII) and has been since its enactment. See 1998 PA 317.

Prior to the enactment of the guidelines, the Legislature enacted a specific sentencing scheme for the offense of indecent exposure by a sexually delinquent person. MCL 750.335a; 1952 PA 73, Appendix 5b. “Sexual delinquency” is not a separate offense and cannot result in an independent conviction. *People v Craig*, 488 Mich 861; 788 NW2d 13 (2010). A person may only be charged as being a sexually delinquent person in conjunction with five enumerated felonies, one of which is indecent exposure. MCL 750.335a(2)(c).⁶ Under the current version of the statute, a

⁴ **Murder 2/Class A** – life or any term of years; **Class B** - up to 20 years; **Class C** - up to 15 years; **Class D** - up to 10 years; **Class E** - up to 5 years; **Class F** - up to 4 years; **Class G** - up to 2 years; **Class H** - jail or other intermediate sanction. See MCL 777.51(2) – MCL 777.54(2).

⁵ This provision was severed in *Lockridge*. See Issue II.

⁶ The remaining enumerated felonies are: crime against nature, MCL 750.158, gross indecency between males, MCL 750.338, gross indecency between females, MCL 750.338a, and gross indecency between a male and a female, MCL 750.338b. These

conviction for indecent exposure by a sexually delinquent person “is punishable by imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life.” MCL 750.335a(2)(c); 2005 PA 300, effective 2/1/06.

Here, in the face of apparently conflicting sentencing authority between MCL 750.335a(2)(c) (requiring a one day to life prison sentence) and MCL 777.16q and MCL 769.34(2) (providing for a minimum prison sentence within the guideline range), the trial court relied on its own mistaken belief that the MDOC would only accept a guidelines sentence, and imposed a 25 to 70 year prison sentence.

This sentence is improper. A plain reading of the various statutes at issue requires a finding that the specific, mandatory penalty provision of MCL 750.335a(2)(c) must control Mr. Arnold’s sentence.

C. The 2005 amendment of MCL 750.335a(2)(c) from “may be punishable” to “is punishable” shows the Legislature’s intent to require a sentence of one day to life following a sentence of incarceration for indecent exposure by a sexually delinquent person.

A plain reading of MCL 750.335a and the 2005 amendment, require a finding that the only appropriate sentence of incarceration for a conviction of indecent exposure by a sexually delinquent person is a prison term of one day to life.

At the time of its enactment, indecent exposure by a sexually delinquent person was punishable by a discretionary term of one day to life. MCL 750.335a; 1952 PA 73, Appendix 5b. The statute directed that the offense “*may be punishable* by imprisonment in the state prison for an indeterminate term, the minimum of

felonies “may be punishable” by a prison term of one day to life. They are also enumerated felonies under MCL 777.16i.

which shall be 1 day and the maximum of which shall be life.” Appendix 5b. This prior version of the penalty provision was held to be in direct conflict with, and subordinate to, Michigan’s Sentencing Guidelines. *People v Buehler*, 477 Mich 18; 727 NW2d 127 (2007).

But, in 2005, the Legislature amended MCL 750.335a(2)(c) so that the one day to life penalty provision was made mandatory following a sentence of incarceration. The Legislature changed the language from “*may be punishable*” to “*is punishable by imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life.*” MCL 750.335a(2)(c) (emphasis added); 2005 PA 300. This version of MCL 750.335a(2)(c) is currently in effect and was in effect at the time of Mr. Arnold’s conviction and sentence. See Table II below, Appendix 6b.

**Table II, Appendix 6b
Amendment to MCL 750.335a**

	MCL 750.335a as Originally Enacted	MCL 750.335a as Amended in 2005
Punishment for indecent exposure by a sexually delinquent person	<p>“Any person who shall knowingly make any open or indecent exposure of his or her person. . . if such person was at the time of the said offense a sexually delinquent person, <i>may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life.</i>” (Emphasis added).</p>	<p>“(1) A person shall not knowingly make any open or indecent exposure of his or her person or of the person of another.</p> <p>(2) A person who violates subsection (1) is guilty of a crime, as follows:</p> <p align="center">* * *</p> <p>(c) If the person was at the time of the violation a sexually delinquent person, the violation <i>is punishable by imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life.</i>” (Emphasis added).</p>
Effective Date	September 18, 1952 1952 PA 73	February 1, 2006 2005 PA 300
Applicable In	<i>Buehler II</i> (2006) and <i>People v Buehler</i> (2007)	<i>People v Arnold</i> (2016) and <i>People v Campbell</i> (2016)

In *People v Buehler (On Remand)*, 271 Mich App 653 (2006) (*Buehler II*), the Court of Appeals addressed the conflict between the sentencing guidelines and the “may be punishable” version of MCL 750.335a(2)(c) and found the guidelines controlling. This holding, however, was expressly restricted to the “may be punishable” language of MCL 750.335a in effect at the time of Mr. Buehler’s conviction, and on the mandatory nature of the guidelines. The court recognized the significance of the 2005 amendment, which removed the discretionary language:

Although not before us, we note that following the release of our prior opinion on October 27, 2005, MCL 750.335a was amended in a manner that arguably removes such discretion from the trial court. See 2005 PA 300, immediately effective December 21, 2005. [*Buehler II*, 271 Mich App at 655, n. 1].

* * *

We note that 2005 PA 300, which amended MCL 750.335a immediately effective December 21, 2005, retained the specific indeterminate sentence of one day to life imprisonment. Because the offense at issue here occurred before the effective date of 2005 PA 300, we express no opinion regarding whether a court is bound when sentencing persons convicted of indecent exposure as a sexually delinquent person after the effective date of 2005 PA 300 by the legislative sentencing guidelines or the more specific indeterminate sentence of one day to life again expressly mandated under the version of MCL 750.335a now in effect. See also n. 1. [*Id.* at 658, n. 4].

In affirming, in relevant part, the holding of *Buehler II*, this Court held that the sentencing guidelines controlled over MCL 750.335a(2)(c). *People v Buehler*, 477 Mich 18 (2007). But, like *Buehler II*, this Court limited its holding and analysis to the prior, discretionary version of MCL 750.335a in effect at the time of Mr. Buehler’s sentence and relied on the mandatory nature of the sentencing guidelines.

This Court similarly expressed “no opinion” whether the 2005 amendment to MCL 750.335a would affect its ruling:

We agree with the panel in *Buehler II* that the Michigan Sentencing Guidelines control over the version of MCL 750.335a in force when defendant committed his crime. We also agree that it is unnecessary to determine whether the recent amendment of MCL 750.335a, 2005 P.A. 300, has altered this conclusion for future offenders. Therefore, we too express no opinion on that issue. [*Buehler*, 477 Mich 18, 24, n. 18].

By its plain language, the 2005 amendment to MCL 750.335a unambiguously transformed the penalty provision of MCL 750.335a(2)(c) from a permissive to a mandatory penalty. The term “may” is permissive, *Manuel v Gill*, 481 Mich 637, 647 (2008), while the word “is” represents the present form of “be,” which means to “exist” or “to express attribution or identity.” Webster’s New World College Dictionary, 5th Edition. “It is presumed that, when the Legislature enacts statutes, it is familiar with the rules of statutory construction and has knowledge of existing laws on the same subject.” *People v Ramsdell*, 230 Mich App 386, 393; 585 NW2d 1, 5 (1998) (citations omitted); See also *Ford Motor Company v City of Woodhaven*, 475 Mich 425, 439-440; 716 NW2d 247 (2006).

Thus, after 2005, a judge choosing a sentence of incarceration for a sexually delinquent person convicted of indecent exposure is required to impose one day to life, and may not impose a guideline range sentence.⁷

⁷ Mr. Arnold’s position is that MCL 750.335a(2)(c) requires a mandatory prison sentence of one day to life *if a sentence of incarceration is imposed* for a conviction of indecent exposure by a sexually delinquent person. See *People v Butler*, 465 Mich 940; 639 NW2d 256 (2001) (“a sentence of probation can be imposed on conviction of

D. The specific and most recently amended penalty provision of MCL 750.335a(2)(c) controls over the more general Michigan Sentencing Guidelines.

The penalty provision of MCL 750.335a(2)(c) is specific, the language is unambiguous, the statute is the most recently amended, and the Legislature's intent is plain: a person convicted under MCL 750.335a(2)(c) and sentenced to incarceration must be sentenced to a prison term of one day to life.

"When there is a conflict between statutes that are read *in para materia*, the more recent and more specific statute controls over the older and more general statute." *Buehler*, 477 Mich at 26. Even if MCL 750.335a(2)(c) and the sentencing guidelines (MCL 769.34(2) and MCL 777.16q) are read to be in conflict with one another, MCL 750.335a(2)(c) controls as it is more specific and more recently amended.

i. MCL 750.335a(2)(c) is more specific.

Prior to the enactment of the guidelines, the Legislature enacted a specific sentencing scheme for convictions of sexual delinquency. In *People v Winford*, 404

being a sexually delinquent person" if a trial court chooses not to impose a prison term of one day to life since "the offense of being a sexually delinquent person isn't listed as an exception to the otherwise inclusive application of the probation statute, MCL 771.1(1)," and because MCL 750.335a and MCL 750.10a do not "contain any statement affecting the availability of probation."). See also *People v Buehler*, 477 Mich at 26-28, recognizing the possibility of a probationary sentence for indecent exposure by a sexually delinquent person. In *Butler* and *Buehler*, the Court was analyzing the version of MCL 750.335a as originally enacted, which is a different version of the statute at issue here; the Court's analysis also pre-dated *Lockridge*. Mr. Arnold takes no position on whether a conviction for indecent exposure by a sexually delinquent person, under the amended version of MCL 750.335a(2)(c), is punishable by a sentence of probation if the trial court chooses not to impose incarceration, or how *Lockridge* might affect that analysis. That question is not directly before this Court.

Mich 400; 273 NW2d 54 (1978), this Court explained that the “history of sexual delinquency legislation clearly indicates the Legislature’s intent to create a comprehensive, unified statutory scheme.” *Id.* at 405-406 (internal citations omitted). The “unified statutory scheme” includes the following statutes:

- The definition of sexual delinquency, MCL 750.10a;⁸
- The procedure for charging sexual delinquency, MCL 767.61a;⁹ and
- Specific penalty provisions for convictions of sexual delinquency, MCL 750.158, MCL 750.335a, MCL 750.338, et al.

The sexual delinquency “legislation was enacted to provide an alternate sentence for certain specific sexual offenses where evidence appeared to justify a more flexible form of incarceration.” *Winford*, 404 Mich at 405-406.

In *People v Kelly*, 186 Mich App 524, 531, 465 NW2d 569, 572 (1990), the Court of Appeals held that MCL 750.335a was more specific and, therefore, controlling over the general indeterminate sentencing statute, MCL 769.9(2).¹⁰ The indeterminate sentencing statute provides that the “court shall not impose a sentence in which the maximum penalty is life imprisonment with a minimum for a term of years included in the same sentence.” By its plain language, MCL 769.9(2) seems to prohibit a sentence of one day to life while MCL 750.335a(2)(c) requires the trial court to impose such a sentence if it chooses incarceration. In analyzing the conflict between MCL 750.335a and MCL 769.9(2), the *Kelly* court noted that MCL 750.335a is more specific given that it was used rarely and limited to only select

⁸ 1952 PA 73, effective 9/18/52; no amendments.

⁹ 1952 PA 234, effective 9/18/52; no amendments.

¹⁰ 1927 PA 175; last amended 1978 PA 77, effective 9/1/78.

offenses. *Kelly*, 186 Mich at 530-531. MCL 769.9(2) is more general as it applies broadly to all offenses in which life imprisonment is the maximum sentence. *Id.* Thus, the court held that “[u]nder the rules of statutory construction, we view the sexually delinquent sentencing scheme as a specific scheme which controls over the general indeterminate sentence act.” *Id.* at 531.

Here too, the more specific statute of MCL 750.335a(2)(c) controls over the more general sentencing guidelines. The sentencing guidelines apply generally to hundreds of felonies and are triggered following convictions for the large majority of crimes. See MCL 777.11 - MCL 777.19. In contrast, MCL 750.335a(2)(c) is specific to one conviction only—indecent exposure by a sexually delinquent person. The one day to life sentencing provision of MCL 750.335a(2)(c) is specific and controlling.¹¹

ii. MCL 750.335a(2)(c) is more recently amended.

In defending the trial court’s sentence, the prosecutor relies on the 2006 amendment to MCL 777.16q, and contends that the *Campbell* court ignored the significance of the 2006 amendment to MCL 777.16q. The prosecution argues that MCL 777.16q should control because the “more recently enacted law has precedence over the older statute.” Plaintiff-Appellant’s Brief on Appeal, p. 4 (internal citations omitted). According to the prosecutor, if “the Legislature had intended to remove

¹¹ Under similar conflicts between a specific sentencing provision and the guidelines, the Legislature has directed that the statutory penalty provisions controlled: “If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections, the court shall impose a sentence in accordance with that statute.” MCL 769.34(2)(a). The Legislature also directed that “[t]he offense descriptions in part 2 of this chapter are for assistance only and the statutes listed govern application of the sentencing guidelines.” MCL 777.6.

the offense of Indecent Exposure by a Sexually Delinquent Person from MCL 777.16q, it would have done so in 2006.” Plaintiff-Appellant’s Brief on Appeal, p. 4. The prosecutor is wrong for three reasons.

First, the 2005 amendment to MCL 750.335a and the 2006 amendment to MCL 777.16q were companion bills that were tie-barred, meaning that the enactment of one depended on the enactment of the other. (HB 4597 and HB 4599, Appendix 7b). “It is presumed that, when the Legislature enacts statutes, it is familiar with the rules of statutory construction and has knowledge of existing laws on the same subject.” *Ramsdell*, 230 Mich App at 393; see also *Ford Motor Company*, 475 Mich at 439-440. The 2006 amendment to MCL 777.16q is insignificant and does not indicate the Legislature’s intent to require individuals convicted of indecent exposure by a sexually delinquent person to be sentenced under the sentencing guidelines. This is especially true given that the Legislature amended MCL 750.335a(2)(c) at the exact same time as MCL 777.16q, and removed the permissive language of MCL 750.335a(2)(c).

Second, the 2005 amendment to MCL 750.335a was a substantive one that is significantly relevant to the issue here, while the 2006 amendment to MCL 777.16q had no effect on the sentences available for indecent exposure by a sexually delinquent person. MCL 750.335a(2)(c) was amended to change the penalty language from “may be punishable” to “is punishable.” This language made the penalty a mandatory one and removed discretion.

In contrast, the 2006 amendment to MCL 777.16q merely added additional enumerated felonies under the authority of the guidelines—the sexually delinquent person offenses of gross indecency between males, gross indecency between females, and gross indecency between males and females, MCL 750.338 et. al, and unlawful imprisonment. Since its enactment in 1998, MCL 771.16q has listed indecent exposure by a sexually delinquent person as a Class A crime that is subject to the sentencing guidelines.

Contrary to the prosecutor’s claim, the 2006 amendment to MCL 777.16q did not “reaffirm” the Legislature’s intent that MCL 750.335a(2)(c) must be subject to the sentencing guidelines. The amendment merely indicated the Legislature’s intent to add *other* sexually-delinquent-related offenses under the purview of the sentencing guidelines. Notably, in contrast to indecent exposure by a sexually delinquent person, the three offenses added to MCL 777.16q through the 2006 amendment all contain discretionary penalty provisions that the offense “may be punishable” by one day to life. MCL 750.338; MCL 750.338a; MCL 750.338b.

Third, MCL 750.335a(2)(c) is the most recently amended statute. The Legislature amended the statute in 2014 and once again maintained the mandatory nature of the one day to life incarceration penalty provision. The prosecutor ignores this amendment in its argument. By the prosecutor’s own analysis, the 2014 amendment to MCL 750.335a(2)(c), which maintained the mandatory nature of the one day to life sentencing provision, evidences the Legislature’s intent that individuals sentenced to incarceration following such a conviction are required to be

sentenced to one day to life. This amendment was more recent than the 2006 amendment to MCL 777.16q and informs the intent of the Legislature. *Buehler*, 477 Mich at 18.

Under a plain reading of the statutes, an individual convicted of indecent exposure by a sexually delinquent person who is sentenced to incarceration must be sentenced to a term of one day to life. When MCL 750.335a was first enacted in 1952, it penalized indecent exposure by a sexually delinquent person by an incarceration term of one day to life. The statute was amended in 2002, in 2005 (changing “may be punishable” to “is punishable”), and most recently in 2014. Since 1952, the one day to life penalty provision has remained. This shows the consistent intent of the Legislature to punish those convicted of indecent exposure by a sexually delinquent person to an incarceration term of one day to life.

II. This court's decision in *People v Lockridge* clarified that the sentencing guidelines are advisory, leaving only one mandatory sentencing provision of incarceration for violations of MCL 750.335a(2)(c): one day to life.

In *People v Lockridge*, 498 Mich 358, 391 (2015), this Court held that Michigan's sentencing guidelines are advisory. This Court severed MCL 769.34(2) "to the extent that it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory." *Id.* at 364. It also struck down any part of MCL 769.34 or any other statute to the extent they refer "to the use of the sentencing guidelines as mandatory or refer[] to departures from the guidelines." *Id.* at 365, n.1. "The sentencing guidelines are advisory *in all applications*." *People v Steanhouse*, __Mich __, __; __ NW 2d __ (2017) (Docket No. 152671); slip op at 2.

Prior to *Lockridge*, MCL 750.335a(2)(c) and the sentencing guidelines arguably *mandated* different sentences. See *Buehler II*, 271 Mich App at 658-9 ("[I]nsofar as MCL 769.34(2) *requires* imposition of a sentence consistent with the minimum guideline range...and MCL 750.335a *expressly requires* a definitive sentence of one day to life, there can be no construction that wholly avoids conflict between these two statutes."); see also, *Id.* at 655 n.1 ("MCL 750.335a was amended in a manner that arguably removes such [sentencing] discretion from the trial court.").

After *Lockridge*, the mandatory language of the sentencing guidelines (MCL 769.34(2)) was severed while MCL 750.335a(2)(c) remains controlling. There is no

longer any potential conflict between the two statutes. Where one of two statutes that cover the same subject matter is mandatory and the other is not, the mandatory statute controls. *In re Kostin*, 278 Mich App 47, 57-58 (2008). The penalty provision in MCL 750.335a(2)(c) controls over the sentencing guidelines where it requires the imposition of a one day to life prison sentence following the trial court's decision to sentence an individual to incarceration.

The prosecutor claims that *Lockridge* has no bearing on this issue, asserting that if “sentencing courts are mandated by MCL 750.355(a)(2)(c) [sic] to sentence a defendant convicted of the offense Indecent Exposure by a Sexually Delinquent Person to one day to life in prison, the requirements of *Lockridge* [to score, consult, and take into account the guidelines] are a farce on these cases.” Plaintiff-Appellant’s Brief on Appeal, pp. 4-5.

This argument ignores the actual holding of *Lockridge*, which is that “the legislative sentencing guidelines are advisory *in all applications*.” *Steanhouse*, __ Mich __ at __; slip op at 2. *Lockridge* struck down the provision of MCL 769.34(2) that is creating the conflict in this case. After *Lockridge*, there is no conflict to resolve. MCL 750.335a(2)(c) is the only mandatory sentencing provision that exists for a conviction of indecent exposure by a sexually delinquent person. There is no rule of law or principle of statutory construction that would permit an advisory statute to control over a mandatory statute.

Further, scoring and consulting the guidelines may serve a purpose other than establishing a minimum sentence. For example, the scoring of prior record

variables and offense variables may be useful to the probation department or MDOC in determining risk factors or recommended programming. The classification of an offense under the guidelines as a crime against a person, property, or otherwise, may also impact decisions made by a trial court, probation, or institution. *Lockridge's* command to score, consult, and take into account the guidelines are not rendered a farce just because the guidelines cannot control the minimum sentence for this conviction.

Mr. Arnold is entitled to resentencing to one day to life where the trial court relied upon an advisory guidelines scheme, as if it were mandatory, and in doing so, acted in direct contravention of the plain language of the mandatory sentencing provision of MCL 750.335a(2)(c).

III. *People v Campbell* was correctly decided. A person convicted of indecent exposure by a sexually delinquent person and sentenced to incarceration must be sentenced to one day to life under MCL 750.335a(2)(c).

People v Campbell, 316 Mich App 279; 894 NW 2d 72 (2016), was correctly decided. The *Campbell* court correctly held that MCL 750.335a(2)(c) supersedes the sentencing guidelines because that statute is mandatory while the sentencing guidelines are advisory. *Id.* at 299-300. A person convicted of indecent exposure by a sexually delinquent person and sentenced to incarceration must be sentenced to a term of one day to life.

In *Campbell*, the Court of Appeals analyzed the conflict between the 2005 amended version of MCL 750.335a(2)(c) and the sentencing guidelines and held that MCL 750.335a(2)(c) controlled. The court acknowledged that the amendment of the “statutory language from ‘may be punishable’ to ‘is punishable’ indicates that the Legislature intended that the indeterminate sentence of one day to life be a mandatory sentence, notwithstanding the sentencing guidelines.” *Campbell*, 316 Mich App at 299. The court held that “trial courts must sentence a defendant convicted of indecent exposure as a sexually delinquent person consistently with the requirements of MCL 750.335a(2)(c)” because “the sentence provided under MCL 750.335a(2)(c) is stated in mandatory terms,” while the guidelines are now “merely advisory” after *Lockridge*. *Id.* at 299-300.

The prosecutor argues that *Campbell* was incorrectly decided because the court “failed to address in any manner what affect Public Act 164 of 2006 had on this issue.”

Plaintiff-Appellant's Brief on Appeal, pp. 4-5. The analysis in *Campbell* was not erroneous for failing to acknowledge 2006 PA 164, an amendment to MCL 777.16q.

First, as discussed in Issue I, D, that amendment was insignificant and predated the more recent 2014 amendment of MCL 750.335a. The 2006 amendment to MCL 777.16q has no effect on the issue at hand.

Second, "[i]f statutes can be construed in a manner that avoids conflict, then that construction should control the analysis." *People v Webb*, 458 Mich 265, 274, 580 NW2d 884 (1998); *People v Williams*, 268 Mich App 416, 425–26; 707 NW2d 624, 630 (2005). The court in *Campbell* avoided a conflict between MCL 750.335a(2)(c) and the sentencing guidelines by relying on the holding of *Lockridge* to hold that MCL 750.335a(2)(c) controls. *Campbell*, 316 Mich App at 299-300. *Lockridge* removed any conflict between the mandatory one day to life penalty provision and the advisory sentencing guidelines. Following established principles of statutory construction, the court in *Campbell* avoided a conflicting reading of the statutes and correctly held that the mandatory provision of one day to life controlled. *Id.*

The prosecutor also claims that the *Campbell* court "failed to address the requirements this Court placed on sentencing courts under *Lockridge*" to score, consult, and take into account the sentencing guidelines. Prosecutor's Brief on Appeal, p. 10. As discussed in Issue II, this argument fails in the wake of *Lockridge* because the sentencing guidelines are merely advisory in all applications, which obviates the sentencing conflict at issue here.

Campbell was correctly decided. This Court should hold that the penalty provision of MCL 750.335a(2)(c) controls the term of incarceration following a conviction of indecent exposure by a sexually delinquent person. If sentenced to a prison term, a person convicted of indecent exposure by a sexually delinquent person must be sentenced to a term of one day to life. *Campbell*, 316 Mich App at 299-300. An individual convicted of that offense is not subject to a prison term calculated by the sentencing guidelines because the guidelines are merely advisory while the one day to life penalty is mandatory.

Summary and Request for Relief

Mr. Arnold asks this Honorable Court to affirm the decision of the Court of Appeals, find that *People v Campbell* was correctly decided, hold that a sentence of one day to life is a mandatory sentence following a conviction of indecent exposure by a sexually delinquent person if an individual is sentenced to incarceration, and remand this case to the trial court and direct that Mr. Arnold be sentenced to a prison term of one day to life.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: /s/ Marilena David-Martin

MARILENA DAVID-MARTIN (P73175)

Assistant Defender

645 Griswold

3300 Penobscot Building

Detroit, Michigan 48226

(313) 256-9833

mdavid@sado.org

Dated: August 16, 2017